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No. _____

In The

Supreme Court of the United States

NATHAN ANDREW KNIATT,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR A WRIT OF CERTIORARI

RICHARD GLADDEN
Texas Bar No. 07991330
100 West Oak Street,
Suite 302
Denton, Texas 76201
(940) 323-9307
(940) 382-5829 (fax)

Of Counsel

WILLIAM T. HABERN
Texas Bar No. 08665500
P.O. Box 8930
Huntsville, Texas 77340
(936) 435-1380
(936) 435-1089 (fax)

Counsel of Record for Petitioner

September, 2006

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Does a Trial Court's ruling that a criminal defendant's plea of guilty was "voluntary" under the Fourteenth Amendment present a "Constitutional Fact" that is subject to independent review on appeal, or is it a "Mixed Question of Law and Fact" entitled to "almost total deference" on appeal when the Trial Court's determination includes an assessment of the defendant's credibility?

Does the Fourteenth Amendment, "as a means of compensating for the perceived shortcomings of the trier of fact by way of bias or some other factor," *Miller v. Fenton*, 474 U.S. 104, 114 (1985), require independent or *de novo* appellate review of a Trial Court's finding that a plea of guilty was "voluntarily" entered, when the Trial Court has been found on appeal to have deliberately "punished" the defendant prior to the plea, within the meaning of the Fourteenth Amendment, for refusing to waive his constitutional right to trial by jury?

Does the "attenuation" doctrine present a question of law that must be independently addressed on appeal to determine whether a Trial Court's unconstitutional treatment of a defendant has tainted the defendant's subsequent plea of guilty?

PARTIES TO THE PROCEEDING

No parties, other than those listed in the caption (Petitioner Nathan Andrew Kniatt, and Respondent State of Texas), have been parties to the proceeding in the court whose judgment is sought to be reviewed.

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The Judgment and Opinion of the Court of Criminal Appeals of Texas from which review is sought, *Kniatt v. Texas*, No. PD-0323-05, 2006 WL 1710881 (June 20, 2006), is not yet published, but is reprinted as Appendix A (App. 1-13). The Judgment and Opinion of the Tenth District Court of Appeals of Texas, which granted Petitioner habeas relief, is published at 157 S.W.3d 83 (Tex.App. – Waco [10th Dist.] 2005), and is reprinted as Appendix B (App. 14-20). The Order and Memorandum Opinion of the 40th Judicial District Court of Texas (hereinafter the "Trial Court"), which denied Petitioner habeas relief, is not reported, but is reprinted as Appendix C (App. 21-25).

JURISDICTION

The Judgment and Opinion of the Court of Criminal Appeals of Texas from which review is sought was entered on June 20, 2006, and accordance with Rule 13.1, this Petition has been timely filed. Jurisdiction of this Court is invoked by Petitioner under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part that "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

On August 22, 2001, Petitioner Nathan Andrew Kniatt (hereinafter "Petitioner") was charged by Indictment under Texas law with the felony offense of possession of a controlled substance of less than one gram, alleged to have been committed on June 10, 2001. On December 7, 2001, the Trial Court learned from the prosecutor and Petitioner's trial counsel that Petitioner had decided not to accept a plea bargain offer made by the prosecutor; that Petitioner would instead invoke his right to trial by jury; and that Petitioner desired to retain other defense counsel. Immediately in response to this news, the Trial Court, without providing Petitioner an opportunity to explain the reasons for his decision, declared in open court:

> "All right. State versus Kniatt, set for trial on Monday [December 10, 2001]. As I understand from the attorneys they thought they had a plea agreement. In fact they had a plea agreement, and today the defendant has reneged on that, doesn't want the agreement. I've also been informed he wants to fire the lawyer. All that's okay with me. I'll take all this up. Defendant's bond is revoked. He's going to jail pending trial. Have a seat over there, sir. We'll set your trial when we get around to it."[1]

Four days later, on December 11, 2001, the Petitioner, who had not conferred with his counsel in the interim, was returned from his confinement in the county jail to the

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[1] App. 2; App. 17, 157 S.W.3d 83, 86 (Tex.App. – Waco [10th Dist.] 2005). Although no motions for continuance were filed by the Petitioner or the State of Texas, Petitioner's case was not called for trial the following Monday, as scheduled.

Trial Court. Shortly after Petitioner's arrival in Court, and predicated solely on Petitioner's response of "yes" to the Trial Court's inquiry as to whether his plea of "guilty" was given "freely and voluntarily," the Trial Court found that Petitioner's plea "substantiated" his guilt of the felony offense charged.[2] In accordance with an alleged "voluntary" plea agreement between Petitioner and the State of Texas, the Trial Court, on the basis of Petitioner's plea of guilty, then placed Petitioner on deferred adjudication community supervision for a period of three years. Prior to accepting Petitioner's plea of guilty, the Trial Court did not ask Petitioner whether he felt he had been, and was being, coerced into entering his plea of guilty.[3]

On February 27, 2003, the State of Texas filed a "Motion to Adjudicate [Petitioner's] Guilt and Impose Sentence." On March 10, 2003, Petitioner was arrested pursuant to a warrant issued by the Trial Court on the State's Motion to Adjudicate; and on April 3, 2003, Petitioner filed an Application for a Writ of Habeas Corpus in the Trial Court. In his habeas application, Petitioner contended that his plea before the Trial Court on December 11, 2001, was given involuntarily within the meaning of the Fourteenth Amendment. In support of his habeas application, Petitioner claimed that prior to entering his plea of guilty the Trial Court had unconstitutionally "punished" him in violation of the Fourteenth Amendment by arbitrarily revoking his pre-trial bond, and by remanding him into indeterminate confinement without bond in

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[2] *See*, Article 42.12, Section 5(a), Texas Code of Criminal Procedure.

[3] App. 19, 157 S.W.3d at 86 ("[Petitioner] was not specifically asked at the time if his plea was coerced.").

retaliation for his refusal to accept the plea bargain offer made by the prosecutor. Contemporaneously with his habeas application, Petitioner filed a motion in accordance with State law that sought to recuse the Trial Judge, who he alleged had coerced his plea, from hearing the merits of his habeas application.

On April 28, 2003, a hearing was held on Petitioner's motion to recuse before another Judge sitting by assignment. After hearing testimony from Petitioner, Petitioner's father, the prosecutor, and Petitioner's attorney at the time of the alleged "voluntary plea" on December 11, 2001; the assigned Judge, after noting "the narrow area" in which he had "to operate," denied Petitioner's motion to recuse the Trial Judge.[4]

On June 4, 2003, the Trial Judge, once again presiding, initially decided to simultaneously hear testimony on both the State's Motion to Adjudicate as well as the Petitioner's Application for Writ of Habeas Corpus. Midway through this hearing however, the Trial Judge reversed that decision and ordered the parties to present only testimony relevant to the allegations contained in the State's Motion to Adjudicate. At the conclusion of the hearing on June 4, 2003, the Trial Court found that Petitioner had violated conditions of his community supervision, adjudicated Petitioner's guilt solely on the

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[4] App. 3; *Tr. Reporter's Rec.*, Vol. V, 138.

basis of his earlier plea of guilty on December 11, 2001,[5] and sentenced Petitioner to 200 days confinement.[6]

On June 13, 2003, the Trial Court resumed its hearing on Petitioner's Application for Writ of Habeas Corpus. After ruling that it would take judicial notice of and consider testimony provided by the parties at prior proceedings in the case, the Trial Court then heard additional testimony from the Petitioner and his father.[7] On June 19, 2003, the Trial Court entered an Order, along with a memorandum opinion containing written findings of fact and conclusions of law, denying Petitioner's Application for a Writ of Habeas Corpus.[8]

On appeal, the Court of Appeals for the Tenth District of Texas first ruled that the Trial Court had violated Petitioner's constitutional right to Due Process when it revoked Petitioner's pre-trial bond as a "sanction" against Petitioner for his refusal to plead guilty on December 7,

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[5] *See*, Article 42.12, Section 5(b), Texas Code of Criminal Procedure.

[6] App. 3-4. The Trial Court when pronouncing Petitioner's sentence on June 4, 2003, and in its written "Judgment Adjudicating [Petitioner's] Guilt" entered the same day, correctly determined that Petitioner was entitled to "98 days" jail credit against his sentence for confinement previously served. *Trial Clerk's Rec.*, Vol. I, 36. A typographical error not relevant to review in this Court (stating that Petitioner "received credit for 198 days served"), appears in the Trial Court's findings of fact discussed later herein.

[7] App. 4. The Trial Judge was not present at the hearing on Petitioner's motion to recuse held on April 28, 2003, and was therefore not in a position to personally make a credibility assessment of the testimony given by either the prosecutor, or Petitioner's former counsel, at that hearing. App. 4 and n. 3; *Tr.Reporter's Rec.*, Vol. V, 1; Vol. VII, 33-35.

[8] App. 21-25.

2001.[9] Second, after conducting an independent examination of the record, the Court of Appeals further ruled that Petitioner had established "by a preponderance of the evidence" that his subsequent plea of guilty four days later on December 11, 2001, had been given involuntarily within the meaning of the Fourteenth Amendment, and was not attenuated from the Trial Court's prior constitutional violation.[10]

On March 3, 2005, the State of Texas filed a petition for discretionary review in the Texas Court of Criminal Appeals, which was granted by that Court on June 29, 2005. Before the Court of Criminal Appeals, the State of Texas did not challenge the intermediate Court of Appeals' ruling that Petitioner had been subjected to a deprivation of his rights under the Due Process Clause as the result of the Trial Court's act of "sanctioning" Petitioner for pleading not guilty, and that finding was left undisturbed by the Court of Criminal Appeals. Rather, the State of Texas contended that with respect to whether Petitioner's subsequent plea was involuntary, the intermediate Court of Appeals had erred "by reviewing the record *de novo* instead of giving appropriate deference to the trial court's determination of historical facts on the application for writ of habeas corpus."[11] In response, Petitioner argued that the constitutional question of whether Petitioner's plea was

[9] App. 17-18, 157 S.W.3d at 86.

[10] App. 18-19, 157 S.W.3d at 86.

[11] *State's Pet. For Discretionary Review*, i; App. 10 ("In its second ground for review, the State argues that the court of appeals erred in reversing the trial court's ruling on appellant's application for writ of habeas corpus because the court of appeals used an incorrect, *de novo* standard of review rather than the correct, abuse-of-discretion standard of review.").

"voluntary," and whether it was "attenuated" from the undisputed prior denial of Due Process by the Trial Court, were both constitutional "questions of law" subject to independent review on appeal.[12] The Petitioner further argued, *citing Miller v. Fenton*, 474 U.S. 104 (1985), that to the extent these constitutional questions involved "mixed questions of law and fact," the Trial Court's direct involvement in the uncontested prior Due Process violation required independent appellate review of the Trial Court's findings of "historical" fact, inasmuch as they were intermingled with the constitutional questions presented. The Petitioner expressly contended that this method of appellate review provided the only constitutional "means of compensating for the perceived shortcomings of the trier of fact by way of bias or some other factor."[13]

The Texas Court of Criminal Appeals, applying an "abuse of discretion standard," rejected Petitioner's arguments and reversed the Court of Appeals' ruling that Petitioner's plea was involuntary. Citing its own prior precedent, and disregarding the relevance of the Trial Court's prior misconduct, the Court of Criminal Appeals ruled that "[a]n appellate court reviewing a trial court's ruling on a habeas claim must review the record in the light most favorable to the trial court's ruling absent an abuse of discretion."[14] The deferential standard adopted by the Court of Criminal Appeals when dealing with Petitioner's involuntary plea

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[12] *Appellant Kniatt's Brief*, No. PD-0323-05, pp. 31, 43-52 (Tex.Crim.App. 2006).

[13] *Id.*, 27-30, *quoting Miller v. Fenton*, *supra*, 474 U.S. at 114.

[14] App. 12, *citing Ex Parte Peterson*, 117 S.W.3d 804, 819 (Tex.Crim.App. 2003).

claim, as derived from the prior precedent it cited, provides that:

> "In reviewing the trial court's decision, appellate courts review the facts in the light most favorable to the trial judge's ruling and should uphold it absent an abuse of discretion. Reviewing courts, including this Court, should afford almost total deference to a trial court's determination of the historical facts that the record supports especially when the trial court's fact findings are based on an evaluation of credibility and demeanor. We also afford that same level of deference to a trial court's ruling on 'application of law to fact questions,' also known as 'mixed questions of law and fact,' if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. But appellate courts review *de novo* those 'mixed questions of law and fact' that do not depend upon credibility and demeanor. Although reviewing courts should also grant deference to 'implicit factual findings' that support the trial court's ultimate ruling, they cannot do so if they are unable to determine from the record what the trial court's implied factual findings are."[15]

Treating the Trial Court's determination that Petitioner's plea was not involuntary as either a question of "historical fact" or as a "mixed question of law and fact" entitled to "almost total deference" on appeal, the Texas Court of Criminal Appeals ruled that, because the Trial Court "could have reasonably" found Petitioner's plea to be

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[15] *Ex Parte Peterson*, *supra*, 117 S.W.3d at 819.

voluntary, the Trial Court's ruling would stand.[16] The Petitioner's case was then remanded to the intermediate Court of Appeals to resolve Petitioner's remaining claim raised under State law concerning whether the assigned Judge abused his discretion when denying Petitioner's motion to recuse the Trial Judge.[17]

REASONS FOR GRANTING THE WRIT

I. Resolving What Standard of Appellate Review Applies to a Trial Court's Finding that a Defendant's Plea of Guilty Was "Voluntary," Presents an Important, Recurring Constitutional Question that Has Not Been, But Should Be Decided by this Court.

The Court long ago established that a criminal defendant who claims that his plea of guilty was involuntary "ha[s] the burden of sustaining his allegations by a preponderance of the evidence." *Walker v. Johnson*, 312 U.S.

[16] App.12 ("the trial court *could have reasonably* concluded that [Petitioner] accepted the State's offer of a plea bargain . . . because [Petitioner] had reasonably concluded that it was in his best interest to accept the plea bargain") (italics added); App. 13 ("Given the record evidence, the trial court *could have reasonably* concluded that [Petitioner] entered his plea voluntarily.") (italics added).

[17] App. 13. The Petitioner's motion to recuse relied upon Rule 18b(2)(a) of the Texas Rules of Civil Procedure. There is thus no question that Petitioner's federal constitutional claim satisfies the "finality" requirement under 28 U.S.C. Section 1257(a). *See, Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975) (explaining that the finality requirement of Section 1257 is satisfied "whe[n] the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case.").

275, 286 (1941). Yet while the Court has stated that "the governing standard as to whether a plea of guilty is voluntary for purposes of the Federal Constitution is a question of federal law . . . and not a question of fact," *Marshall v. Lonberger*, 459 U.S. 422, 431 (1983); and while the Court has, conversely, identified as one of fact the question of whether a defendant has "received and understood sufficient notice of charges against him to render [his] guilty plea voluntary," *Miller v. Fenton*, 474 U.S. 104, 113 (1985); the Court has not resolved the question of what standard governs appellate review of Trial Court findings that a defendant's plea was not *coerced* by the Trial Court, but was, instead, given "voluntarily."

This Court has ruled that the "voluntariness" of a defendant's extra-judicial confession presents an issue that constitutionally requires "independent" appellate review.[18] The Court has ruled that a Trial Court's finding of "actual malice" in the First Amendment context constitutionally requires independent appellate review of the Trial Court's findings.[19] The Court has ruled that a Trial Court's findings of "reasonable suspicion" and "probable cause" in the Fourth Amendment context constitutionally require independent appellate review.[20] And, the Court has

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[18] *Miller v. Fenton*, *supra*, 474 U.S. at 110 ("the Court's confession cases hold that the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination.").

[19] *Bose Corp. v. Consumers Union of the United States*, 466 U.S. 485, 501 (1984) ("the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge.").

[20] *Ornelas v. United States*, 517 U.S. 690, 697 (1986) ("We think independent appellate review of these ultimate determinations of

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found it constitutionally necessary to independently review a Texas Trial Court's findings that a defendant had not been "arrested" prior to giving a confession.[21]

In each of the foregoing cases the Court found independent appellate review of Trial Court findings constitutionally required, in whole or in part, due to the Court's recognition that:

- Sweeping deference would allow varied results under similar facts, inconsistent with a unitary system of law;
- where legal concepts acquire content only through application, independent review is necessary to maintain control of and clarify legal principles; and
- independent review may provide the only means of compensating for the perceived shortcomings of the trier of fact by way of bias or some other factor.

Because a Trial Court's determination of whether a defendant's plea of guilty was "voluntary" invariably involves an assessment of the defendant's "credibility and demeanor," review of that question in Texas is not "a question of federal law" subject to independent review, but is, at most, only a "mixed question of law and fact" in which the Trial Court's ruling is entitled to "almost total

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reasonable suspicion and probable cause is consistent with the position we have taken in past cases.").

[21] *Kaupp v. Texas*, 538 U.S. 626, 631 (2003) ("Contrary reasons mentioned by the state courts are no answer to the facts."); *see also*, *Thompson v. Keohane*, 516 U.S. 99, 102 (1995) ("the issue whether a suspect is 'in custody' . . . presents a mixed question of law and fact qualifying for independent review.").

deference."[22] Under this "almost total deference" standard of appellate review, moreover, a Trial Court will be deemed to have made such an assessment of witness "credibility and demeanor" even when, as in the present case, the Trial Court has ostensibly found a defendant's plea "voluntary" primarily on the basis of *prior recorded testimony* of other witnesses.[23]

As demonstrated by the differing outcomes in the two appellate courts below, the constitutional result is this case depends, as it will in many others, on whether an "independent" or an "abuse of discretion" standard applies on appellate review of Trial Court findings that a plea of guilty was voluntarily given. The present case, even more so because it starkly exemplifies those dependent and distinctly different possible outcomes, offers the Court an exceptional opportunity to resolve that question. In light of the recurring nature and importance of this question in the administration of criminal justice, certiorari should be granted.

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[22] App. 12, *citing Ex Parte Peterson*, *supra*, 117 S.W.3d at 819 ("Reviewing courts, including this Court, should afford almost total deference to a trial court's determination.").

[23] The Texas Court of Criminal Appeals found "almost total deference" to the Trial Judge's findings was "especially" warranted in light of the implicit weight given by the Trial Court to the *prior recorded testimony* of Petitioner's former trial counsel, Redington. App. 12; App. 4 and n. 3. Given the Trial Court's absence from the hearing at which that testimony was given, *Tr.Reporter's Rec.*, Vol. V, 1; Vol. VII, 33-35; the Trial Court's assessment of Redington's prior recorded testimony would have involved an assessment of witness "credibility and demeanor" only in the most expansive sense of that term.

II. There Is a Direct Conflict Between the Decisional Law of Texas, and the Decisional Law of Three Other State Courts of Last Resort and the U.S. Courts of Appeals for the First, Sixth, Eighth and Tenth Circuits, Over Whether Independent Appellate Review Is Required When the Trial Court Is Alleged to Have Unconstitutionally Coerced a Defendant's Plea of Guilty.

Issues of whether a Trial Court's actions have caused a defendant to enter an involuntary plea of guilty most frequently arise when a Trial Court is alleged to have improperly "participated" in a defendant's decision to plead guilty as part of a "judicial plea bargaining" process.[24] The undisputed unconstitutional action of the Trial Court in the present case, *i.e.*, of punishing Petitioner for his decision to plead not guilty, represents an extreme and flagrantly unconstitutional example of "judicial participation" in the "plea bargaining process." While the particular technique employed by the Trial Court in the present case is (presumably) less common in "judicial plea bargaining," it is not unique.[25]

In the Federal Courts, Rule 11(c)(1) of the Federal Rules of Criminal Procedure (hereinafter "Rule 11(c)(1)") has largely rendered moot the question of what standard of appellate review should apply to constitutional claims

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[24] E. Wakefield, *Judge's Participation in Plea Bargaining Negotiations as Rendering Accused's Guilty Plea Involuntary*, 10 A.L.R. 4th 689 (1981).

[25] *See*, R. Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 Hofstra L.Rev. 1349, 1381 and nn. 229 and 230 (2004) (discussing similar case wherein trial court revoked defendant's pre-trial bond "as part of the attempt to persuade the defendant to plead guilty.") (hereinafter "Klein").

that a Trial Court has coerced a defendant's plea of guilty. Rule 11(c)(1) procedurally prohibits federal Trial Courts from participating in plea negotiations and, by inference, from engaging in other conduct designed to induce a defendant's plea of guilty. Violations by federal Trial Courts of the prohibition in Rule 11(c)(1) are subject to "harmless error" review on appeal.[26]

While the procedural strictures of Rule 11(c)(1) are not constitutionally mandated and do not apply to State court proceedings,[27] both the Advisory Committee Notes to Rule 11, and the American Bar Association proposal that preceded (and influenced) the adoption of present Rule 11(c)(1), explicitly recognized that a Trial Court's direct involvement in a defendant's decision to plead guilty raises serious constitutional concerns. Principal among these concerns was that a Trial Court's involvement in the defendant's decision might render it "difficult" for the Trial Court thereafter "to objectively assess the voluntariness of the plea."[28] Numerous courts and legal commentators have raised the same constitutional concern. In even stronger terms, they have almost unanimously reached the same conclusion.[29]

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[26] Fed.R.Crim.P. 11(h).

[27] *See*, 1A C. Wright, *Federal Practice and Procedure*, Section 175.1, at 246-247 (3d ed. 1999) (Rule 11 "is not necessarily a constitutional inhibition [on judicial discussions looking toward a plea] and the rule itself has no effect on state judges.").

[28] Notes of the Advisory Committee on Rules, former Rule 11(e)(1) (1974 amendment), 18 U.S.C.A., at 351 (West 1986); A.B.A. Project on Minimum Standards for Criminal Justice, *Standards Relating to Pleas of Guilty*, Section 3.3(a), at 73 (Approved Draft, 1968).

[29] *See*, Note, *The Unconstitutionality of Plea Bargaining*, 83 Harv.L.Rev. 1387, 1392 (1970) ("most observers agree that a judge who

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At least thirteen States continue to permit their State trial judges to "participate" in "the plea bargaining process."[30] Fifteen other States, through State decisional law or procedural rules analogous to Fed.R.Crim.P. 11(c)(1), expressly prohibit Trial Court conduct that could potentially coerce a defendant's involuntary plea.[31] State procedural rules that either prohibit or limit Trial Court inducement of guilty pleas generally afford the defendant, unlike the State of Texas' "almost total deference" standard,

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participates in the negotiations leading to the plea cannot be expected to make a neutral judgment about its voluntariness."); Klein, *supra*, 32 Hofstra L.Rev. at 1400-1401 ("How can the judge be the objective and impartial arbiter that is required when assessing whether he had improperly pressured, threatened, or coerced the defendant to enter the plea?"); P. Whitman, *Judicial Plea Bargaining*, 19 Stan.L.Rev. 1082, 1089-1090 (1967) ("the judge will be unable to review the defendant's plea impartially"); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U.Pa.L.Rev. 865, 892 (1964); *United States v. Werker*, 535 F.2d 198, 202 (2nd Cir. 1976) ("[a] judge's involvement in the plea process detracts from the judge's objectivity by making it difficult for a judge to subsequently assess the voluntariness of the plea objectively."); *United States v. Adams*, 634 F.2d 830, 839 (5th Cir. 1981) ("We cannot truly expect this role to be filled by a trial judge who has participated in discussions leading to a plea bargain, for such a judge may . . . feel a personal stake in the acceptance of the plea or have a preconceived notion of its validity."); *United States v. Bruce*, 976 F.2d 552, 557 (9th Cir. 1992); *Cripps v. State*, 137 P.3d 1187, 1190 (Nev. 2006).

[30] *Cripps v. State, supra,* 137 P.3d at 1189 n. 8 (listing, in addition to Nevada: Arizona, California, Connecticut, Florida, Hawaii, Idaho, Illinois, Missouri, North Carolina, Oregon, Utah and Vermont).

[31] *Id.*, 137 P.3d at 1189 n. 9 (listing: Alaska, Arkansas, Colorado, Delaware, Georgia, Maine, Massachusetts, Mississippi, New Mexico, North Dakota, South Dakota, Tennessee, Virginia, Washington, and West Virginia).

a meaningful right to appellate review under a "harmless error" standard.[32]

The "almost total deference" standard employed by the Court of Criminal Appeals of Texas provides no meaningful obstacle to judicial coercion of involuntary pleas of any kind, no matter how unconstitutional and extreme. In contrast to the Texas standard, at least three other State courts of last resort, and the United States Courts of Appeals for the First, Sixth, Eighth and Tenth Circuits, have ruled that "independent" appellate review of Trial Court findings is constitutionally required in this area.

In *State v. Byrd*, 407 N.E.2d 1384 (1980), the Supreme Court of Ohio, per Chief Justice Calebrezze, ruled that for constitutional reasons "a trial judge's participation in the plea bargaining process must be carefully scrutinized to determine if the judge's intervention affected the voluntariness of the defendant's guilty plea." *Id.*, 407 N.E.2d at 1388. Under the standard adopted in *State v. Byrd*, should independent appellate review reveal "that the judge's conduct in all probability" coerced the defendant's plea of guilty, the defendant's plea is considered "involuntary and void" under the Federal Constitution. *Ibid.*

The Supreme Court of Wisconsin also requires greater appellate scrutiny into the voluntariness of a defendant's plea of guilty than the "almost total deference" standard

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[32] *E.g., Cripps v. State, supra*, 137 P.3d at 1192 (applying "harmless error" standard to determine under Nevada's state procedural rule "whether the district court's [erroneous participation] may reasonably be viewed as having been a material factor affecting the defendant's decision to plead guilty."); *accord*, *Boyd v. United States*, 703 A.2d 818, 824 (D.C. 1997) (same); *State ex rel. Brewer v. Starcher*, 465 S.E.2d 185, 197-198 (W.Va. 1995).

applied by the Texas Court of Criminal Appeals. *Compare*, *State v. Brown*, 716 N.W. 2d 906, 914 (Wis. 2006) ("Whether a plea is . . . voluntary is a question of constitutional fact . . . [and] we determine independently whether those facts demonstrate that the defendant's plea was . . . voluntary."); *see also*, *State v. Pouncey*, 630 P.2d 932, 937 (Wis.Ct.App.1981) ("Regardless of the precise wording of the standard (and, indeed, independent of any specific standard), we believe the appropriate appellate function is to scrutinize the available record carefully to determine whether or not the judge's presence and/or involvement affected the voluntariness of the defendant's plea.").

The Supreme Court of Nebraska appears also to have adopted a standard of independent appellate review in this context. *State v. Svoboda*, 287 N.W.2d 41, 45 (1980) ("We likewise think it is clear that the trial court's remarks to [defendant], whether so intended or not, must have and did impress upon [defendant] the hopelessness of his situation, and brought about the *nolo contendere* pleas.").

The United States Courts of Appeals for the First, Sixth, Eighth, and Tenth Circuits, in addition to the foregoing State courts of last resort, conduct an independent examination into whether a defendant's plea was voluntary, notwithstanding Trial Court findings. *See*, *Euziere v. United States*, 249 F.2d 293, 295 (10th Cir. 1957) ("We think it is clear that the statements made by the trial court were reasonably calculated to influence the defendants to the point of coercion into entering their pleas of guilty."); *Toler v. Wyrick*, 563 F.2d 372, 374 (8th Cir. 1977) ("We must, therefore, examine all the facts surrounding

the guilty plea to determine its voluntariness.");[33] *Longval v. Meachum*, 651 F.2d 818, 820 (1st Cir. 1981) ("Our review leads us to conclude that the judge's remarks could reasonably have had a chilling effect on the exercise of the defendant's right to trial by jury.");[34] *Caudill v. Jago*, 747 F.2d 1046, 1050 (6th Cir.1984) ("This court must therefore assess the voluntariness of [defendant's] plea in light of all the relevant circumstances surrounding that plea.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM T. HABERN
Texas Bar No. 08665500
P.O. Box 8930
Huntsville, Texas 77340
(936) 435-1380
(936) 435-1089 (fax)

Counsel for Petitioner

Of Counsel:

RICHARD GLADDEN
Texas Bar No. 07991330
100 West Oak Street,
Suite 302
Denton, Texas 76201
(940) 323-9307
(940) 382-5829 (fax)

September, 2006

[33] Under facts remarkably similar to the present case, the Eighth Circuit Court of Appeals in *Tyler v. Swenson*, 427 F.2d 412 (1970) found that "the fact finding procedure" employed by the Missouri appellate courts, which had found a State Trial Court's findings of "voluntariness" not "clearly erroneous," *see*, *State v. Tyler*, 440 S.W.2d 470 (Mo. 1969) (en banc), deprived the defendant of a "full, fair, and adequate hearing" under federal law.

[34] *Vacated on other grounds*, 458 U.S. 1102 (1982), *on remand*, 693 F.2d 236 (1982).

APPENDIX A

2006 WL 1695941

NATHAN ANDREW KNIATT, Appellant
v.
THE STATE OF TEXAS
No. PD-0323-05

Court of Criminal Appeals of Texas.
DELIVERED JUNE 20, 2006

ON THE STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE TENTH COURT OF APPEALS ELLIS COUNTY

Holcomb, J., delivered the opinion of the Court, in which Keller, P.J., and Price, Johnson, Keasler, Hervey, and Cochran, JJ., joined. Keller, P.J., also filed a concurring opinion. Meyers, J., did not participate. Womack, J., concurred in the result.

The Tenth Court of Appeals "found" that appellant had "met his burden of showing . . . that his guilty plea [had been] involuntarily given," and ordered the trial court to grant appellant the habeas relief that he had requested. *Kniatt v. State,* 157 S.W.3d 83, 87 (Tex.App. – Waco 2005). We reverse and remand.

The relevant, undisputed facts, as reflected in the record, are as follows. On June 10, 2001, law enforcement officials in Ellis County searched appellant's person without a warrant, found methamphetamine, and then arrested him for possession of that methamphetamine. The officials then placed appellant in the Ellis County Jail, where he stayed until released on bond about a week later.

On August 22, 2001, an Ellis County grand jury returned an indictment charging appellant with felony

possession of less than one gram of methamphetamine. *See* Tex. Health & Safety Code § 481.115(a) & (b).

On December 7, 2001, the trial court held a pretrial hearing in this case. At that hearing, appellant's trial counsel, Ted Redington, and the assistant district attorney, Patrick Wilson, both informed the trial court that appellant had decided to reject a plea bargain to which he had previously agreed. Redington also informed the trial court that appellant had decided to retain different counsel. The trial court, speaking for the record and to appellant, responded as follows:

> "All right. State versus Nathan Kniatt, set for trial on Monday [December 10, 2001]. As I understand from the attorneys, they thought they had a plea agreement. In fact, they did have a plea agreement, and today the defendant has reneged on that, doesn't want the agreement.
>
> "I've also been informed he wants to fire his lawyer. All that's okay with me. I'll take all this up. Defendant's bond is revoked. He's going to jail pending trial.[1]
>
> "Have a seat over there, sir. We'll set your trial when we get around to it."

On December 11, 2001, appellant, accompanied by Redington, returned to court and entered a guilty plea pursuant to a plea bargain substantially similar to the one

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[1] The trial court's revocation of appellant's bond was plainly unlawful. As Professors Dix and Dawson have observed, "Texas law confers no general power upon judges . . . to revoke bail and regard the revocation as rendering a defendant nonbailable." G. Dix & R. Dawson, 41 Tex. Prac. Series, *Criminal Practice and Procedure* § 16.152 (2d ed.2001).

he had rejected previously. Appellant, who was eighteen years old at that time and of sound mind and average intelligence, swore under oath that his guilty plea was being entered "freely and voluntarily." The trial court, in accordance with the terms of the plea bargain, deferred an adjudication of appellant's guilt, placed him on community supervision for three years, and fined him $3,000.

On February 23, 2003, the State filed a motion to proceed with an adjudication of guilt. In its motion, the State alleged that appellant had violated several of the conditions of his community supervision.

On April 3, 2003, appellant filed a pre-conviction application for writ of habeas corpus, pursuant to Article 11.08 of the Texas Code of Criminal Procedure, and a motion to recuse the trial court judge from hearing that application or from hearing the State's motion to proceed with an adjudication of guilt. In his application, appellant alleged that his December 7, 2001, guilty plea had been entered "involuntarily." In his brief accompanying his application, appellant argued that "the trial court's [unlawful] action in [revoking his bond] and remanding [him] into the custody of the Ellis County Sheriff [to await] trial [coerced him and] rendered [his] subsequent plea involuntary." Appellant also argued that "the statements and actions of his former counsel, Redington, as well as those of Assistant District Attorney Wilson, operated to coerce [him into an] involuntary plea."

On April 28, 2003, an assigned judge held an evidentiary hearing on appellant's motion to recuse and denied it.

On June 4, 2003, the trial court held an evidentiary hearing on both the State's motion to proceed with an

adjudication of guilt and appellant's application for writ of habeas corpus.[2] Midway through the hearing, the State asked that "the writ portion of [the] hearing" be postponed to a later date, so that the State would have more time in which to locate one of its witnesses. The trial court granted the State's request. At the conclusion of the hearing, the trial court also granted the State's motion to proceed with an adjudication of guilt, and then adjudicated appellant guilty of the primary offense. The court assessed appellant's punishment at incarceration for 200 days and a $3,000 fine.

On June 13, 2003, the trial court held an evidentiary hearing on appellant's application for writ of habeas corpus. At that hearing, the trial court received the testimony of four witnesses: appellant; appellant's father, Paul Kniatt; Redington; and Wilson.[3] Appellant testified that (1) immediately before the pretrial hearing on December 7, 2001, Wilson had "threatened" him "that if [he] didn't take the plea bargain on that day, that they wouldn't offer it again and they would give [him] the maximum sentence;" (2) contrary to what Redington and Wilson had told the trial court on December 7, 2001, he had never agreed to a plea bargain until shortly before his guilty plea on December 11, 2001; and (3) he had agreed to the plea bargain on

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[2] A trial court may properly consider, in a single hearing, both a motion to proceed with an adjudication of guilt and an application for writ of habeas corpus. *See Jordan v. State*, 54 S.W.3d 783, 786 (Tex.Crim.App.2001).

[3] Two of the witnesses (appellant and his father) testified in person at the June 13, 2003, habeas hearing. The other two witnesses (Redington and Wilson) testified in person at the April 28, 2003, recusal hearing, but their testimony at the recusal hearing was admitted for all purposes at the habeas hearing.

December 11, 2001, only because he "didn't want to sit in jail without a bond for who knows how long."

Appellant's father, Paul Kniatt, testified that immediately before the pretrial hearing on December 7, 2001, he had heard Redington warn appellant that if he rejected the plea bargain, "the judge was going to put him in jail."

Redington testified that (1) in late November 2001, he had met with appellant and had discussed with him all of his options, including the State's offer of a plea bargain involving deferred adjudication; (2) he had advised appellant "that a plea would probably be in his best interest," because appellant's only possible defense was an "arguable" motion to suppress; (3) appellant had telephoned him a few days after their November meeting and had accepted the State's offer; (4) immediately before the pretrial hearing on December 7, 2001, appellant "came [in] with his dad, and . . . they were both in kind of a tizzy and talking about not wanting the plea bargain anymore;" (5) he had advised appellant at that time that if he reneged on the plea bargain, the trial court might revoke his bond and put him in jail to await trial; (6) sometime after the pretrial hearing on December 7, 2001, appellant's stepmother had telephoned him to relate that appellant had decided to accept the State's plea bargain offer after all; (7) neither he (*i.e.,* Redington) nor Wilson had ever tried to coerce appellant into accepting the plea bargain offer; and (8) appellant had never told him that he was pleading guilty because it was his only way to get out of jail. Redington's testimony continued:

> Q [by defense counsel]: Knowing this defendant and your interaction with him, 18-year-old young man, as to him particularly, did what [the trial court] did [*i.e.,* revoking appellant's bond], was it

likely to cause, likely to interfere with him completely exercising his own volition freely and voluntarily [on December 11, 2001] as to whether or not to take that plea [bargain offer]?

* * *

A: I don't think so.

Q: And can you give the reasons why you think that would have no effect on someone's decision whether to plead or not?

A: Because we had a thorough and complete discussion about all of his options ten days before. And on the basis of that thorough discussion, he made the free and independent choice to accept the plea bargain. It wasn't until his dad came in with him [on December 7, 2001] that his judgment seemed to be affected. I think rather than – I don't think it was the jail that caused him to change his mind.

Q: Well, he changed his mind in between . . . the moment his bond was revoked and when he came back, didn't it? Okay. Prior to his bond being revoked, he didn't want to take the plea; will you agree with me on that? He refused?

A: Well, I don't know. Before [December 7, 2001] he did want to take the plea. Ten days ago he was more than happy to take the plea.

Q: I'm talking about on December 7th.

A: He comes in with a whole new idea with his dad.

* * *

Q: What happened between the time that the judge revoked his bond, since you didn't go see

> him [in the jail], and the time that he came into court on Tuesday [December 11, 2001] that would have caused the taint of what had occurred on the 7th to dissipate?
>
> A: Cool reflection perhaps on what was in his best interest.

Finally, Wilson testified in relevant part that he had never threatened or coerced appellant in any way.

At the close of the evidence at the June 13, 2003, habeas hearing, appellant argued that he had proved by a preponderance of the evidence that his guilty plea had been entered involuntarily. More specifically, appellant argued that he had proved that on December 11, 2001, "he [had] reasonably felt that he was coerced and that his only avenue to get out of jail was to waive his right to trial by jury and . . . accept the plea bargain." Appellant argued further that he had proved that, in pleading guilty, he had "acquiesc[ed] to what he [had] perceived to be actions by this court, by his own attorney, as well as the prosecution to coerce him into accepting that plea agreement." As for the relief sought, appellant asked the trial court to set aside both the order placing him on deferred adjudication and the subsequent judgment of conviction.

On June 19, 2003, the trial court issued an order denying appellant's request for habeas corpus relief. Also on June 19, 2003, the trial court issued findings of fact in which it found that, on December 7, 2001, appellant had in fact reneged on a plea bargain, as Redington had claimed. The trial court also admitted in its findings of fact that it had "sanctioned" appellant, by revoking his bond, for his decisions to renege on the plea bargain and replace his counsel.

Appellant appealed from both the trial court's order denying his request for habeas corpus relief and the visiting judge's order denying his motion to recuse. With respect to the trial court's order denying his request for habeas corpus relief, appellant argued that the trial court had erred in rejecting the legal and factual arguments he had made in that court.

The Tenth Court of Appeals granted appellant relief on his habeas claim and did not reach his recusal claim. The court of appeals explained its decision as follows:

> "Kniatt argues that the trial court erred in denying his application for writ of habeas corpus on the grounds that his plea on December 11, 2001, was not voluntarily given. . . .
>
> * * *
>
> "Kniatt contends that the statements and actions of his former counsel [Redington], the assistant district attorney [Wilson], and the trial court operated to render his plea involuntary. . . .
>
> * * *
>
> "Kniatt contends that the trial court's action in revoking his bond and ordering him held without bond pending trial constituted an unconstitutional punishment in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. . . . Kniatt argues that the trial court's action was intended to coerce him to plead guilty and punish him for exercising his right to trial by jury.
>
> "In its findings of fact on the habeas application, the trial court acknowledged that it 'sanctioned' Kniatt by revoking his bond and remanding him

to jail in response to his decision to renege on the plea bargain and replace his counsel. . . .

"The record supports Kniatt's contention that the trial court improperly revoked his bond. However, Kniatt must also show that the trial court's action pressured him to plead guilty. Our review of the record persuades us that a person in Kniatt's position would have reasonably believed that his incarceration was the result of his decision not to plead guilty. At the hearing on Kniatt's motion to recuse, Redington testified that he had told Kniatt that if he did not plead guilty the judge was likely to send him to jail to await a trial date. Kniatt testified that he subjectively felt pressured to change his plea and enter a plea of guilty. He testified that the reason he changed his mind between December 7 and December 11 was because he did not want to 'sit in jail without a bond for who knows how long.' At the time Kniatt entered his plea, he had been in jail for four days and did not know when his case would be set for trial.

* * *

"We find that Kniatt has met his burden of showing by a preponderance of the evidence that his guilty plea was involuntarily given. We find that the trial court erred in denying Kniatt's application for writ of habeas corpus. Accordingly, we sustain that issue. Having sustained this issue, we need not address Kniatt's additional issue arguing that the [assigned judge] erred in denying his motion to recuse the trial judge from considering the motion to adjudicate and the habeas application.

> "We reverse the trial court's denial of Kniatt's application for a writ of habeas corpus and remand to the trial court to grant Kniatt relief consistent with this opinion. We order the trial court to set aside the judgment adjudicating guilt and proceed with a new trial."

Kniatt v. State, 157 S.W.3d at 85-87.

The State subsequently filed a petition for discretionary review, in which it puts forth two grounds for review. In its first ground, the State argues that the court of appeals lacked jurisdiction to review the trial court's ruling on appellant's application for writ of habeas corpus, because the trial court itself, at the time it heard the application, lacked jurisdiction to hear it. The trial court lacked jurisdiction to hear the application, the State's argument continues, because the trial court had already adjudicated appellant guilty by the time it heard his application. In its second ground for review, the State argues that the court of appeals erred in reversing the trial court's ruling on appellant's application for writ of habeas corpus because the court of appeals used an incorrect, *de novo* standard of review rather than the correct, abuse-of-discretion standard of review.

We granted the State's petition to consider these two grounds for review. *See* Tex.R.App. Proc. 66.3(e). We turn first to the State's first ground, relating to the lower courts' jurisdiction. At the time appellant filed his application for writ of habeas corpus, it was a pre-conviction application, and, pursuant to Article 11.08, the trial court had jurisdiction to hear it. Did the trial court lose jurisdiction to hear appellant's application once that court adjudicated him guilty?

In *Ex parte Johnson,* 12 S.W.3d 472 (Tex.Crim.App.2000), Mark Anthony Johnson filed a post-conviction application for writ of habeas corpus while his direct appeal was still pending and, therefore, before his conviction became final. Under Article 11.07, this Court has no jurisdiction to consider post-conviction applications until the underlying convictions become final. We dismissed Johnson's application for lack of jurisdiction, even though by the time we dismissed the application his conviction had become final, "because the application . . . was filed during the pendency of the direct appeal." 12 S.W.3d at 473. We thus held, in effect, that the jurisdiction of a court to consider an application for writ of habeas corpus is determined at the time the application is filed. We adhere to that holding today and hold that the trial court in this case did not lose jurisdiction to hear appellant's pre-conviction application once that court adjudicated him guilty. We overrule the State's first ground for review.

We turn next to the State's second ground for review, relating to the court of appeals' standard of review. A guilty plea constitutes a waiver of three constitutional rights: the right to a jury trial, the right to confront one's accusers, and the right not to incriminate oneself. *Boykin v. Alabama,* 395 U.S. 238, 243 (1969). Accordingly, a guilty plea, to be consistent with due process of law, must be entered knowingly, intelligently, and voluntarily. *Id.* at 242; *McCarthy v. United States,* 394 U.S. 459, 466 (1969). To be "voluntary," a guilty plea must be the expression of the defendant's own free will and must not be induced by threats, misrepresentations, or improper promises. *Brady v. United States,* 397 U.S. 742, 755 (1970). A defendant's sworn representation that his guilty plea is voluntary "constitute[s] a formidable barrier in any subsequent

collateral proceedings." *Blackledge v. Allison,* 431 U.S. 63, 73-74 (1977).

An applicant seeking habeas corpus relief on the basis of an involuntary guilty plea must prove his claim by a preponderance of the evidence. *Ex parte Morrow,* 952 S.W.2d 530, 535 (Tex.Crim.App.1997). An applicant's delay in seeking habeas corpus relief may prejudice the credibility of his claim. *Ex parte Young,* 479 S.W.2d 45, 46 (Tex.Crim.App.1972). An appellate court reviewing a trial court's ruling on a habeas claim must review the record evidence in the light most favorable to the trial court's ruling and must uphold that ruling absent an abuse of discretion. *Ex parte Peterson,* 117 S.W.3d 804, 819 (Tex.Crim.App.2003).

Given the record evidence in this case, especially Redington's testimony, the trial court could have reasonably concluded that appellant had accepted the State's offer of a plea bargain and had pled guilty on December 11, 2001, not because the trial court had punished him by revoking his bond and putting him in jail to await trial, but because he had reasonably concluded that it was in his best interest to accept the plea bargain and take deferred adjudication community supervision and a modest fine. That is to say, on this record the trial court could have reasonably concluded that (1) in late November 2001, Redington had advised appellant that it was probably in his best interest to accept the State's offer of a plea bargain; (2) appellant had initially agreed to the plea bargain but had later changed his mind, probably because of his father's influence; (3) sometime between December 7, 2001, and December 11, 2001, appellant had decided to accept the State's offer of a plea bargain after all; (4) appellant had later filed an application for writ of habeas corpus, not because his guilty plea had been involuntary

but because he had wanted to avoid the consequences of his failure to abide by the terms of his community supervision; (5) appellant had been sincere when, on December 11, 2001, he had sworn that his guilty plea was voluntary; and (6) appellant had decided later that he had pled guilty only because he "didn't want to sit in jail without a bond for who knows how long."

We note that the record contains no evidence that appellant, at the time he pled guilty, was so gripped by fear of incarceration that, even with the assistance of counsel, he could not rationally weigh the advantages of pleading guilty against the disadvantages of going to trial. We also note that the trial court could believe or disbelieve any of the witnesses and could properly take into account the fact that appellant made no claim of an involuntary plea until after the State filed its motion to proceed to an adjudication of guilt.

In summary, we discern no abuse of discretion on the part of the trial court. Given the record evidence, the trial court could have reasonably concluded that appellant had entered his guilty plea voluntarily, *i.e.,* that appellant's guilty plea had not been induced by threats, misrepresentations, or improper promises, and the court of appeals erred in holding otherwise. We sustain the State's second ground for review.

We reverse the judgment of the court of appeals and remand the case to that court so that it may consider appellant's remaining claim.

APPENDIX B

157 S.W.3d 83

Nathan Andrew KNIATT, Appellant,
v.
The STATE of Texas, Appellee.
No. 10-03-00199-CR.

Tenth Court of Appeals of Texas, Waco.

Jan. 5, 2005.

Richard S. Gladden, Law Office of Richard S. Gladden, Denton, for appellant.

Joe F. Grubbs, Ellis County Dist. Atty., Waxahachie, for appellee.

Before Chief Justice GRAY, Justice VANCE, and Justice REYNA.

OPINION

BILL VANCE, Justice.

Nathan Kniatt was charged with possession of methamphetamine. On December 11, 2001, he entered a plea of guilty. In accordance with a plea bargain agreement, the trial court deferred adjudication of guilt, placed Kniatt on community supervision for three years, and assessed a fine of $3,000. On February 27, 2003, the State filed a motion to revoke Kniatt's community supervision and to proceed with adjudication of guilt. On April 3, 2003, Kniatt filed an application for a writ of habeas corpus and a motion to recuse the trial judge. After a hearing before a different judge, sitting by assignment, the motion to recuse was denied. The trial court heard the State's motion to revoke on June 4, 2003, and adjudicated Kniatt

guilty. On June 13, 2003, the trial court heard testimony on Kniatt's application for writ of habeas corpus, and denied the writ by order on June 19, 2003. Kniatt appeals from this determination.

Jurisdiction

Kniatt alleged in the application for writ of habeas corpus that his 2001 plea to the charge was not voluntary. Kniatt filed his application while the motion to revoke community supervision was still pending. Kniatt's habeas application concerns a pre-adjudication application for relief pursuant to Article 11.08 of the Texas Code of Criminal Procedure. Tex.Code Crim. Proc. Ann. art. 11.08 (Vernon 1977). Under article 11.08, a criminal defendant who has been indicted, but not yet convicted, may file an application for writ of habeas corpus that is returnable to the court in which the defendant stands indicted. *Id.* Nothing prevents a probationer from filing an article 11.08 or 11.09 writ application after the State has filed a motion to revoke, and nothing prevents the trial court from considering the application along with the State's motion to revoke probation. *Jordan v. State*, 54 S.W.3d 783, 786 (Tex.Crim.App.2001). Because probation is not considered to be a final conviction, an application for writ of habeas corpus filed during the pendency of revocation proceedings is returnable to the trial court and reviewable by a court of appeals. *Nix v. State*, 65 S.W.3d 664, 669 (Tex.Crim.App.2001). The court of return distinguishes the pre-conviction writ from the post-conviction writ, the latter being made returnable to the Texas Court of Criminal Appeals after review by the trial court. Tex.Code Crim. Proc. Ann. art. 11.07 (Vernon Supp.2004); *Ex parte Gray*, 126 S.W.3d 565, n. 3 (Tex.App.-Texarkana 2003). Kniatt's application was made while he

was still on community supervision pursuant to a deferral order. The application was therefore a pre-conviction writ, regardless of the fact that the trial court proceeded to adjudicate before hearing and denying Kniatt's application. Thus, we have jurisdiction to consider Kniatt's appeal from the denial of the writ.[1]

Involuntary Plea

Kniatt argues that the trial court erred in denying his application for writ of habeas corpus on the grounds that his plea on December 11, 2001, was not voluntarily given.

The burden of persuasion in a writ of habeas corpus is on the applicant to prove his allegations by a preponderance of the evidence. *Ex parte Lafon*, 977 S.W.2d 865, 867 (Tex.App.-Dallas 1998, no pet.). We review the evidence presented in the light most favorable to the trial court's ruling and accord great deference to the trial court's findings and conclusions. *Id.* We will accept the trial court's decision whether to grant the requested relief absent an abuse of discretion. *Id.; Ex parte Ayers*, 921 S.W.2d 438, 440 (Tex.App.-Houston [1st Dist.] 1996, no pet.).

When a defendant attests at his original plea hearing to the voluntary nature of his plea, there is a heavy burden on him at a later hearing to show a lack of voluntariness. *Coronado v. State*, 25 S.W.3d 806, 809 (Tex.App.-Waco 2000, pet. ref'd). To determine the voluntariness of a plea, we examine the record as a whole. *Id.*

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[1] Relying on *Saucedo v. State*, the State suggests we lack jurisdiction over this appeal. *Saucedo v. State*, 795 S.W.2d 8 (Tex.App.-Houston [14th Dist.] 1990, no pet.). We disagree.

Kniatt contends that the statements and actions of his former counsel, the assistant district attorney, and the trial court operated to render his plea involuntary. In June 2001, while Kniatt was in jail on the methamphetamine charge, his father hired attorney Ted Redington to represent Kniatt. In November of 2001, Redington met with Kniatt and discussed the felony charge and a plea bargain offered by the State for three years deferred adjudication and a $1,500 fine. There is some dispute as to whether Kniatt agreed to accept that plea bargain. On December 7, 2001, Kniatt's father accompanied him to his pretrial appearance. Before the appearance, Redington, Kniatt, and his father met and discussed the plea agreement. Kniatt's father called the agreement "ridiculous" and told Redington that they had decided to go to trial and seek a new attorney.

When the trial judge called the case, Redington and the prosecutor approached the bench to inform the judge that they had thought they had an agreement but did not. Redington informed the judge that Kniatt wanted to fire him and hire another lawyer. From the bench, the trial judge said:

> As I understand from the attorneys they thought they had a plea agreement. In fact they had a plea agreement, and today the defendant has reneged on that, doesn't want the agreement. I've also been informed he wants to fire the lawyer. All that's okay with me. I'll take all this up. Defendant's bond is revoked. He's going to jail pending trial. Have a seat over there, sir. We'll set your trial when we get around to it.

Kniatt contends that the trial court's action in revoking his bond and ordering him held without bond pending

trial constituted an unconstitutional punishment in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Due process requires that a pretrial detainee not be punished. *Schall v. Martin*, 467 U.S. 253, 269, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984). Kniatt argues that the trial court's action was intended to coerce him to plead guilty and punish him for exercising his right to trial by jury.

In its finding of fact on the habeas application, the trial court acknowledged that it "sanctioned" Kniatt by revoking his bond and remanding him to jail in response to his decision to renege on the plea bargain and replace his counsel. A trial court has great latitude and discretion in fixing the amount of a bond. *See* Tex.Code Crim. Proc. Ann. art. 17.15 (Vernon Supp.2004-05). However, this discretion is more limited with respect to revoking a bond. *See id.* art. 17.40 (Vernon Supp.2004-05) (requiring that a magistrate find by a preponderance of the evidence that the defendant violated a condition of the bond imposed before the bond may be revoked); *see also Lee v. State*, 39 S.W.3d 373, 376 (Tex.App.-Houston [1st Dist.] 2001, no pet.). The record does not reveal any history of the defendant's failing to appear in court as directed. The power of the trial court to set bail is not to be used to oppress or punish. Tex.Code Crim. Proc. Ann. art. 17.15; *Ex parte Vance*, 608 S.W.2d 681, 683 (Tex.Crim.App.1980).

The record supports Kniatt's contention that the trial court improperly revoked his bond. However, Kniatt must also show that the trial court's action pressured him to plead guilty. Our review of the record persuades us that a person in Kniatt's position would have reasonably believed that his incarceration was the result of his decision not to plead guilty. At the hearing on Kniatt's motion to recuse,

Redington testified that he had told Kniatt that if he did not plead guilty the judge was likely to send him to jail to await a trial date. Kniatt testified that he subjectively felt pressured to change his plea and enter a plea of guilty. He testified that the reason he changed his mind between December 7 and December 11 was because he did not want to "sit in jail without a bond for who knows how long." At the time Kniatt entered his plea, he had been in jail for four days and did not know when his case would be set for trial.

The State argues that Kniatt did not file a writ of habeas corpus claiming the plea was involuntary until the State filed its motion to revoke. The State also points out that Kniatt was properly admonished at the time he entered his plea and affirmed that his plea was free and voluntary. Kniatt was not specifically asked at the time if his plea was coerced.

We find that Kniatt has met his burden of showing by a preponderance of the evidence that his guilty plea was involuntarily given. We find that the trial court erred in denying Kniatt's application for writ of habeas corpus. Accordingly, we sustain this issue. Having sustained this issue, we need not address Kniatt's additional issue arguing that the trial court erred in denying his motion to recuse the trial judge from considering the motion to adjudicate and the habeas application.

CONCLUSION

We reverse the trial court's denial of Kniatt's application for a writ of habeas corpus and remand to the trial court to grant Kniatt relief consistent with this opinion.

We order the trial court to set aside the judgment adjudicating guilt and proceed with a new trial.[2]

Chief Justice GRAY dissenting.

TOM GRAY, Chief Justice, dissenting.

Any way you approach it, this is now a collateral attack on a conviction rendered pursuant to a plea bargain. Kniatt cannot appeal the plea, so the Court is coming through the back-door to allow what cannot come in through the front-door.

Yes, because the trial court determined the merits of Kniatt's application, we had jurisdiction to review the pretrial habeas corpus. *Ex parte Hargett*, 819 S.W.2d 866, 868-869 (Tex.Crim.App.1991). But when the trial court heard and accepted the plea and rendered its judgment, our jurisdiction to review the habeas terminated. *Saucedo v. State*, 795 S.W.2d 8, 9 (Tex.App.-Houston [14th] 1990, no pet.); *Budd v. State*, No. 07-97-0054-CR, 1998 WL 783755, *2-3 (Tex.App.-Amarillo Nov.10, 1998, no pet.) (not designated for publication); *see also Ex parte Branch*, 553 S.W.2d 380, 381 (Tex.Crim.App.1977). I would dismiss this appeal for want of jurisdiction. Because the Court does not, I dissent.

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[2] At oral argument, the State agreed that if the application for writ of habeas corpus were granted, the proper remedy would be to set aside the conviction.

APPENDIX C

Cause No. 25704CR

EX PARTE	§	IN THE 40th JUDICIAL
NATHAN KNIATT, Applicant	§	DISTRICT COURT
	§	ELLIS COUNTY, TEXAS

ORDER DENYING WRIT OF HABEAS CORPUS

(Filed Jun. 19, 2003)

On June 13, 2003, came on to be heard the pretrial application for Writ of Habeas Corpus and, after hearing testimony and argument of counsel, and records of the Court, it is determined that the writ should be denied.

It is therefore Ordered, Adjudged and Decreed that all relief requested is denied.

SIGNED this the 19 day of June, 2003.

/s/ Gene Knize
JUDGE PRESIDING

Cause No. 25704CR

EX PARTE	§	IN THE 40th JUDICIAL
	§	
NATHAN KNIATT,	§	DISTRICT COURT
Applicant	§	
	§	ELLIS COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON APPLICANT'S APPLICATION FOR WRIT OF HABEAS CORPUS

(Filed Jun. 19, 2003)

After reviewing the application for writ of habeas corpus, the testimony and evidence presented at the hearing on the writ, the Court's file and applicable law, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Applicant was charged by indictment filed August 22, 2001, with the offense of possession of a controlled substance, namely methamphetamine, in an amount less than one gram, alleged to have been committed on or about June 10, 2001.

2. At Arraignment on October 4, 2001, Applicant's case was set for non-evidentiary pretrial on November 1, 2001, and for evidentiary pretrial on December 7, 2001, and for jury trial on December 10, 2001. By court order, December 7, 2001 was the last day judgments under plea agreements would be entered by the Court. All pretrial motions were required to be filed not later than 7 days prior to each hearing, with notice to opponent so witnesses could be subpoenaed and each side would be prepared.

3. Applicant had retained attorney Ted Redington to represent Applicant on the felony charge and on a related misdemeanor possession of marijuana charge prior to October 4, 2001.

4. Ted Redington is known to the Court to be a credible person who is an attorney board-certified in criminal law and who practices in Ellis County.

5. Following a court appearance on Applicant's misdemeanor case, Redington and Applicant discussed the State's plea bargain offer on the felony case which was three years' deferred adjudication under community supervision and a $1500 fine.

6. Applicant and Redington discussed all of Applicant's options, including the filing of a motion to suppress evidence and trial by jury and that a plea under an agreement had to be completed no later than December 7, 2001 or defendant would go to trial December 10, 2001. Redington pressed Applicant for a decision because if there were no plea agreement, motions had to be prepared and timely filed with notice and preparations made for the scheduled pretrial and trial.

7. Prior to December 7, 2001, Applicant called Redington to tell him that Applicant wished to take the State's plea bargain offer and plead guilty to the charged felony offense. Redington so informed the prosecutor.

8. Applicant was 18 years and 11 months of age in December 2001, and was competent to stand trial.

9. On December 7, 2001, Applicant appeared for the scheduled evidentiary pretrial which was to take place in the event a plea agreement had not been made. Applicant informed Redington that Applicant would not be entering a plea of guilty under the agreement and that Applicant would be hiring a new attorney for a trial.

10. Redington informed the prosecutor in the case that Applicant had reneged on the plea agreement and had also fired Redington. Both attorneys approached the bench to inform the Court. The State and Defense informed the Court that Applicant had reneged upon his plea agreement and was firing Redington, therefore, proper motions had not been filed, prospective witnesses had not been subpoenaed, and neither was ready for evidentiary pretrial on December 7, 2001 or trial on December 10, 2001.

11. The Court, after being informed that Applicant had reneged on his earlier agreement and that he wished to fire his attorney at the last minute, sanctioned Applicant by revoking bond and remanded Applicant to jail pending trial.

12. Applicant later contacted Redington through Applicant's stepmother and informed Redington that he did wish to take the State's plea bargain offer.

13. On December 11, 2001, Applicant entered a plea of guilty to the charged offense under a new plea agreement which doubled the fine originally offered. Applicant was properly admonished and swore that his plea of guilty was voluntary. Redington assured the Court that Applicant understood the proceeding and was competent.

14. No application for writ of habeas corpus claiming Applicant's plea was involuntary was filed between December 11, 2001, and April 3, 2003.

15. On February 27, 2003, the State filed a motion to revoke Applicant's community supervision and to proceed with adjudication of guilt.

16. On April 3, 2003, the State filed an amended motion, and Applicant filed a motion to recuse the trial judge and an application for writ of habeas corpus, alleging

for the first time that his original plea of guilty was involuntary.

17. On April 29, 2003, Judge Marshall entered an order denying the motion to recuse.

18. On June 4, 2003, the Court heard the State's motion to adjudicate, revoked Applicant's community supervision, adjudicated Applicant guilty, and sentenced Applicant to serve 200 days in state jail and pay a $3,000.00 fine with credit for 198 days served.

19. On June 13, 2003, the Court heard evidence relative to Applicant's application for writ of habeas corpus.

20. Applicant was informed and knew on October 4, 2001 and again on November 1, 2001 that a plea agreement had to be consummated not later than December 7, 2001 or trial would ensue on December 10, 2001. On December 7, 2001, Applicant reneged on the plea agreement, but Applicant also did not want to go to trial as scheduled because he thought he might get more punishment at trial than offered in the plea agreement. Applicant concluded that the only way to postpone everything was to "rehire" counsel.

21. Applicant attempted to manipulate and delay court proceedings by firing his attorney at the last minute.

CONCLUSIONS OF LAW

1. Applicant's original plea of guilty to the charged offense was freely and voluntarily made.

2. Applicant is not being illegally restrained.

/s/ Gene Knize
JUDGE PRESIDING